EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109594/2019

Held at Glasgow on 15 January 2020

Employment Judge A Kemp

Mrs N Kaminska	**Claimant** **Represented by** **Mr C Moran,** **Solicitor**
Your Group Limited	**First Respondent** **No appearance**
Dr Emanuele Clozza	**Second Respondent** **No appearance**
Mr Joseph Albert Michael Smyth	**Third Respondent** **No appearance**
Dr Stephen Smith	**Fourth Respondent** **No appearance**

Mr Fintan O'Rourke **Fifth Respondent**
No appearance

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Tribunal makes the following findings:**
   - **(i) There was a relevant transfer of the employment of the claimant to the first respondent under Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 20 May 2019**
   - **(ii) The claimant was dismissed by the first respondent on 30 May 2019**
   - **(iii) The sole reason for the dismissal was that she was on maternity leave, having commenced maternity leave on 1 March 2019**
   - **(iv) The dismissal was unlawful discrimination under section 18 of the Equality Act 2010**
   - **(v) The dismissal was induced by the fourth respondent in terms of section 111 of the Equality Act 2010, or aided by him in terms of section 112 of the said Act**
   - **(vi) The dismissal was instructed, or induced, by the fifth respondent in terms of section 111 of the said Act, or aided by him in terms of section 112 of the said Act**
   - **(vii) The dismissal was unfair under section 99 of the Employment Rights Act 1996**
   - **(viii) There was an unlawful deduction from the earnings of the claimant under section 13 of the Employment Rights Act 1996 by the first respondent in respect of accrued but unpaid holiday pay.**

2. The Tribunal makes the following declarations:

(i) There had been no information provided to or consultation with the claimant or any elected employee representatives in respect of that transfer under the terms of Regulation 13 of the said Regulations

(ii) Regulation 15 of the said Regulations was therefore breached

(iii) The first respondent as transferee is liable for that breach jointly and severally with the transferor.

3. The Tribunal awards the claimant the following sums

(i) Against the first respondent the total sum of SIXTY SEVEN THOUSAND NINE HUNDRED AND SEVENTEEN POUNDS FIFTY SEVEN PENCE (£67,917.57) in respect of the following-

(a) Compensation for unlawful discrimination under the Equality Act 2010 in the sum of £53,731.08, jointly and severally with the fourth and fifth respondent

(b) A compensatory award for unfair dismissal under the Employment Rights Act 1996 in the sum of £500

(c) An award for the failure to inform and consult over a transfer under the said Regulations in the sum of £8,013.98

(d) An award for unlawful deduction from wages under the Employment Rights Act 1996 for accrued holiday pay in the sum of £589.

(e) The total of those sums being taxable, the sum required to account for the tax due of £5,083.51.

(ii) Against the fourth respondent jointly and severally with the first respondent and fifth respondent the sum of FIFTY SIX THOUSAND FIVE HUNDRED AND THIRTY EIGHT POUNDS EIGHTY FIVE PENCE, (£56,538.85) in respect of unlawful discrimination under the Equality Act 2010, being the sum of £53,731.08 and the sum required to account for the tax due of £2,807.77

(iii) Against the fifth respondent jointly and severally with the first respondent and fourth respondent the sum of FIFTY SIX THOUSAND FIVE HUNDRED AND THIRTY EIGHT POUNDS EIGHTY FIVE PENCE, (£56,538.85) in respect of unlawful discrimination under the Equality Act 2010. being the sum of £53,731.08 and the sum required to account for the tax due thereon of £2,807.77.

4. The Tribunal awards the claimant the sum of EIGHT HUNDRED AND THIRTY TWO POUNDS FORTY ONE PENCE (£832.41) as expenses under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, payable jointly and severally by the first respondent, fourth respondent, and fifth respondent.

5. The Tribunal dismisses the claim for compensation for a failure to provide written reasons.

6. The Tribunal dismisses the Claim as made against the second respondent and the third respondent.

7. The Tribunal orders the first respondent to provide written submissions within 14 days of the date of this Judgment as to whether it should be ordered to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A, and if so in what amount, having regard to its ability to pay.

REASONS

Introduction

1. This Claim was made against five respondents. The claimant sought a number of remedies under the Equality Act 2010 ("the 2010 Act"), the Employment Rights Act 1996 ("the 1996 Act"), and the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations").

2. The Claim had been intimated to all respondents but none of them presented a Response Form. The case called for a Final Hearing, Notice of which had been sent to all of the respondents. None of them appeared at the Hearing. The Notice to the first respondent was sent to its registered office. That for the fourth and fifth respondent was sent "c/o Your Group Limited" at that registered office. Records from Companies House had that address listed for the fourth respondent as a director of that company. No address for the fifth respondent appears from Company House records produced at the Final Hearing. His circumstances are referred to in the Facts set out below. The Claim Form gave as the address for the fifth respondent the same as that for the fourth respondent, and the Notice of the Final Hearing was served at that address.

3. The case proceeded before me, sitting alone, as it was not defended, following a Preliminary Hearing held on 24 October 2019 at which it was clarified that the primary claim was made under section 18 of the Equality Act 2010, with certain other claims made as alternatives.

Evidence

4. Evidence was given by the claimant herself and by her husband. The claimant spoke to a number of documents that were produced in a Bundle.

The issues

5. The issues that arose for decision were:

(i) Whether there had been a relevant transfer of the claimant's employment to the first respondent

(ii) Whether the claimant had been dismissed, and when

(iii) If so, what the sole or principal reason for that was

(iv) Whether the reason was unlawful discrimination

(v) Whether the reason was automatically unfair

(vi) If the reason was not automatically unfair but was potentially fair, whether it was fair or unfair

(vii) Whether the claimant had been informed and consulted about a transfer if that was held to have taken place under (i) above

(viii) Whether there had been any unlawful deduction from earnings

(ix) Whether any of the second to fifth respondents were liable for any matters alleged by the claimant, and if so on what basis

(x) What remedy should be afforded to the claimant in the event that a claim succeeded.

The Facts

6. The Tribunal found the following facts established:

7. The Claimant is Mrs Neda Kaminska. Her date of birth is 9 April 1984.

8. She was employed by Harley Street Smile Limited ("Harley") as a dental nurse with effect from 6 March 2017.

9. Harley was incorporated on 18 March 2015 as a limited company in England and Wales under Company number 09495706. Its shareholders as at 19 March 2019 included Dr Emanuele Clozza, the second respondent, and Dr Stephen Smith, the fourth respondent. The second respondent held 95 shares, approximately 24% of the shareholding of Harley. The fourth respondent had held 5 shares, approximately 2.5% of

the shareholding of Harley. 33 shares, approximately 16% of the shareholding of Harley, had been held in name of Lisa O'Rourke. 190 shares had been issued.

10. Harley provided dentistry services to a number of clients. It operated from premises at 117 Harley Street, London, where the claimant and its other employees worked. It had a lease of those premises from its landlords. It utilised items of equipment and furniture that it owned in order to provide those services. It traded under the name "Yourdentist.co.uk". It had external signage and branded correspondence using that trading name. The claimant was employed on the basis of working 40 hours per week.

11. The directors of Harley included the second respondent and until his resignation on 19 March 2019, the third respondent.

12. The second respondent is a dentist, and acted as clinical director of Harley.

13. The third respondent was responsible for sales and marketing of Harley.

14. The fourth respondent is Dr Stephen Smith. He is a dentist, and operated as a dentist at the premises of Harley on a self-employed basis on average two days per week.

15. The fifth respondent was designed on emails and business cards as the Business Manager of Harley. He exercised substantial managerial control over the business conducted by Harley. He had the ability to employ or dismiss staff. He had authority over the claimant.

16. The first respondent is Your Group Limited. It is a company incorporated in Scotland under company number SC595488 on 26 April 2018. Its registered office is Caledonian House Suite 3/2, 100 High Street, Irvine, KA12 0AX.

17. The third respondent was notified to Companies House as being a person who ceased to have significant control of the first respondent on 16 May 2019.

18. On 27 November 2019 the fourth respondent was notified to Companies House as a person with significant control of the first respondent on 1 May 2019. (Evidence as to the shareholdings in the first respondent was not before the Tribunal.)

19. The fourth respondent was appointed a director of the first respondent on 10 April 2019. The third respondent was a director of the first respondent until that appointment was terminated on 19 April 2019.

20. In about mid-July 2018 the claimant discovered that she was pregnant. She informed the fifth respondent of that at that time, and in discussion with them shortly thereafter, the second, third and fourth respondents.

21. None of the second to fifth respondents made arrangements to have a risk assessment conducted in light of the claimant's pregnancy.

22. On 18 September 2018 the claimant was signed off work by her GP due to complications in pregnancy. She was admitted to hospital for three days. She was signed as fit to return to work on 8 October 2018 on the basis that she did not undertake any heavy lifting, or substantial pushing or pulling of objects. She was asked by Harley's practice manager to obtain that advice in writing, which she did. No risk assessment in relation to her was undertaken.

23. The claimant obtained a MAT- B1 form on 25 October 2018 and provided that to Harley. It gave as the expected week of birth the week that included 16 March 2019.

24. Around the time of her doing so Harley attempted to change her working hours from 40 per week to 20 per week. She protested against that, and continued to work 40 hours per week.

25. On 9 November 2018 the claimant raised concerns over her being at reception, situated next to the X-Ray room, when X-rays were being taken. A notice in that room stated that reception should be told when X-rays were taken so that the person working there could move. The claimant was concerned lest X-rays may affect her unborn child. She raised that initially with the Practice Manager of Harley. On the working day afterwards the fifth respondent spoke to her to criticise her for doing so. He told her to "stop gossiping" and to stop talking about the issue. She was upset by his actions in doing so.

26. In December 2018 the claimant was informed by email by the Practice Manager of Harley at about 9pm not to come to work for her shift the next day. She protested about that in an email to her. The fifth respondent told her in an email sent shortly thereafter that he required an immediate meeting with her, and when that meeting was held on the next day he told her that had she not been pregnant he and the third respondent had concluded that she would have been dismissed for her behaviour.

27. As the claimant became visibly pregnant, the claimant was utilised less and less at reception, or where she would be seen by customers of Harley.

28. In early December 2018 the claimant sought to take holidays for the period 28 January 2019 to 3 March 2019, with the intention that she then commence maternity leave. Initially she had an indication that that would be approved, but latterly in mid January 2019 the fifth respondent asked her in a series of messages if she could work carrying out duties from home. She agreed to do so at his request, and did then work mainly at home, although attending the premises of Harley on two occasions, up to the birth of her child. She did not take the holidays that she had requested.

29. In late 2018 the claimant and her husband sought to purchase a property. They were then residing in rented accommodation in London, and this was to be their first owned property. They applied for a mortgage with Halifax plc to do so. That mortgage application required written confirmation of the

claimant's employment and salary. A letter was provided to the claimant on 9 January 2019, but dated 14 December 2018, which gave that confirmation. The letter also referred to her commencing maternity leave, proposed a return to work date of 1 March 2020 and set out the statutory maternity pay she would receive.

30. The claimant sent an email to Harley on 9 January 2019 to confirm that she intended to return to work on 2 December 2019, which was acknowledged on the same day.

31. The claimant thereafter exchanged a series of messages with the fifth respondent with regard to the possibility of her carrying out work from her home after the birth of her child, including as to the duties that she could perform. She had hoped that by that stage she would be living in Bournemouth where the property the subject of the mortgage application was situated.

32. On 28 February 2019 the claimant gave birth to her daughter. The birth was prior to the date proposed in the MAT-B1. The claimant's maternity leave commenced on 1 March 2019.

33. The claimant did not receive any statutory maternity pay from Harley in March 2019, or in April 2019. She had not received any communication from Harley, or any of the second to fifth respondents, about maternity pay. On 8 May 2019 she sent an email to the second, third and fifth respondents stating "desperately need my maternity pay" and stating that she could seek it through HMRC. Later that same day she sent the same recipients form SMP1 to complete. She did not receive a reply to her emails.

34. On 20 May 2019 Harley went into administration. Philip Armstrong and Philip Watkins of FRP Advisory LLP ("FRP") were appointed joint administrators.

35. Immediately on that appointment all the business and assets of Harley were sold to the first respondent for £200,000. The sale included all items of equipment and furniture situated in the premises Harley had occupied under lease.

36. The first respondent carried on the business of Harley with effect from 20 May 2019. The first respondent continued to trade at the same premises at 117 Harley Street, London using the same items of equipment, furniture and other assets of Harley to do so. It continued to use the same trading name. It continued to use the same external signage and trading name in correspondence. It continued to provide the same type of services to the same clients as had Harley. Approximately six of the employees of Harley were transferred to the employment of the first respondent on 20 May 2019, including the fifth respondent. The fourth respondent continued to provide dentistry services to patients. The business that had been carried on by Harley continued under the control of the first respondent without any interruption.

37. The claimant had emailed the second respondent on the issue of her maternity pay on a number of occasions, latterly on 16 May 2019. On 20 May 2019 the second respondent replied to state that the fourth respondent had "just bought the practice, it is his responsibility now".

38. The claimant emailed the fifth respondent on 20 May 2019 to refer to the message from the second respondent that the fourth respondent had bought the practice. The fifth respondent replied to state "its good news for all". He indicated that the second respondent had "lost everything. But from me [the fifth respondent] owning the clinic I now don't. Steve [the fourth respondent] is the one that bought it. So I am going to be working alongside him but at the moment no one knows that's happening…."

39. The claimant also emailed the fourth respondent on 20 May 2019 and on 21 May 2019 he replied that "[Harley] went into administration yesterday which means the company is no more…..I am working with the administrators over the coming days to update on what is happening.

Please ignore what [the second respondent] is saying as only the administrator is dealing with next steps."

40. On 29 May 2019 FRP wrote to the claimant and advised her of the appointment as administrators on 20 May 2019. It further stated that "the business and assets of the Company were sold to Your Group Limited immediately on the appointment on 20 May 2091. It stated the "understanding that you [the claimant] ceased attending work prior to this date". The date referred to was 20 May 2019. It further confirmed "that the Company is no longer in a position to make payments for services rendered by you under its contract of employment with you." The letter stated, "You should therefore regard your service as terminated, as from the date you ceased attending or from 20 May 2019 whichever is earlier." The letter directed the claimant to make any claim for unpaid wages, accrued holiday pay, redundancy or payment in lieu of notice to the Redundancy Payments Service, and added that that Service would "also independently decide if your employment is subject to the Transfer of Undertakings (Protection of Employment) Regulations 2009.

41. The claimant had not ceased attending work prior to 20 May 2019. She had commenced her maternity leave with effect from 1 March 2019, and she had intended to exercise her right to return to work on 2 December 2019.

42. The claimant called FRP on receipt of that letter on 30 May 2019 and spoke to Mr Chris Wilson there. He stated to her that the fifth respondent had provided a list of employees who he said had ceased to attend work prior to the administration and that she was on that list. The claimant explained that she was on maternity leave, having had her baby on 28 February 2019. Mr Wilson said that had FRP known that she would have been part of the transfer of staff, but that she should pursue a claim to the tribunal.

43. No request for written reasons for dismissal or other communication about the circumstances was submitted to the first respondent by the claimant.

44. On 1 June 2019 the claimant sent messages to a person she knows only as Kristina, who was taken on as an employee by Harley in about November 2018 with a view to providing maternity cover for the claimant, in which Kristina stated that she continued to work at the first respondent, along with the fifth respondent.

45. On 5 June 2019 the claimant sent an email to her solicitors instructed in the purchase of the property in Bournemouth to inform them of the loss of her employment. They in turn contacted Halifax, and in light of the changed circumstances the offer of funding was withdrawn in respect of the claimant herself. The funding that could be secured from the claimant's husband's income was not sufficient to proceed with the purchase, which was due for completion on or around 12 June 2019. The purchase accordingly could not proceed.

46. The claimant was greatly upset by the loss of her employment. She also felt very stressed. She consulted her General Practitioner on 7 June 2019 and did so thereafter in respect of stress or related matters on 20 June, 28 June, 8 July, 23 July, 15 August, 1 October, 20 October, 17 October, 21 October and 5 November 2019. A further consultation took place on 13 January 2020 as the Final Hearing approached. No medication was provided to her for stress or her other symptoms, but she received informal counselling and guidance from her GP.

47. The claimant suffered a change in personality as a result of the loss of her employment. From being a generally happy person she became withdrawn, sad, and easily upset. She would burst out crying regularly. Her husband was worried that she was depressed. He arranged for her to visit his parents in Poland in summer 2019 for two weeks, and for them to return to the UK with her and spend two weeks with them thereafter. The claimant did so though she barely speaks Polish.

48. The claimant lost the prospective purchase of her first property with her husband as a result of the termination of her employment. She was greatly distressed by that, and the need to remain in rented accommodation. She

had been looking forward to moving to the new house with her husband and new baby.

49. The claimant and her husband moved to new rented property on 29 June 2019 where they continue to reside.

50. The claimant's sense of upset and stress as a result of the termination of her employment is likely to continue for a period of approximately one year**.**

51. HMRC made payment to the claimant of all her statutory maternity pay. The Redundancy Payments Service made payment to the claimant of a statutory redundancy payment, and statutory notice.

52. No payment has been made by any party in respect of the claimant's 38 hours of accrued annual leave to 30 May 2019.

53. Latterly when employed at Harley she was paid at the rate of £15.50 per hour, an annual salary of £32,240. She was paid monthly, and provided with payslips. Her net pay on her payslip in April 2019 was £1,278.97. Her net pay on her payslip in March 2019 was £1,794.98. Her net pay on her payslip in February 2019 was £2,438.13. Her net pay on her payslip in January 2019 was £2,579.06. Her net pay on her payslip in December 2018 was £3,512.51.

54. Following the termination of employment the claimant made enquiries about working as a dental nurse, but has no family or friends to assist with looking after her child. She is in the course of retraining as a mortgage adviser. That is a role that she can undertake from her home. She requires to undertake that training in three separate stages, with examinations after each stage. She is shortly to sit the examination after stage one. It is likely that she will complete that training by around January 2021, and by the end of February 2021 she is likely to secure employment earning a salary of between £30,000 and £40,000 per annum. In the period up to February 2021 it is unlikely that she will have any income.

55. As a result of the termination of employment and inability to complete the house purchase the claimant lost the cost of legal expenses for that purchase of £240, travel costs of trips to Bournemouth by train totalling £535.15, and a valuation fee of £200.

56. The claimant has incurred costs of her mortgage advisory course of £99 for preparatory work and will have the cost of each of three stages each stage costing £185.

57. On 8 August 2019 Mr Wilson of FRP emailed the claimant's solicitors and stated "…I can confirm that the sale of the Company's business and assets was subject to TUPE with certain members of staff transferring to the purchaser" and that the Redundancy Payments Service were making payment to all of the affected employees. TUPE is a reference to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

58. In an administrator's progress report dated 19 December 2019, it was recorded that under the agreement to sell Harley to the first respondent, the first respondent was granted a six month licence to occupy the premises of Harley in order to negotiate the terms of a continued tenancy with the landlord. It further stated that "it has since come to our attention that not all of the Company's employees transferred to the purchaser". The schedule of work attached at Appendix C referred as work undertaken during the reporting period to "writing to each associated employee being transferred to the purchaser to advice them of their revised employment status following transfer under the TUPE regulations".

59. The claimant commenced Early Conciliation in respect of all respondents on 13 June 2019 and the Certificate for each was issued by ACAS on 12 July 2019

60. The claimant commenced the present proceedings on 5 August 2019.

61. The claimant is taxed under the provisions that apply in England and Wales.

Submission

62. For the claimant the submission was that there had been a transfer of undertaking under Regulation 3(1)(a) of the Regulations, and that the claimant had been dismissed by a combination of the comments made by the fourth and fifth respondents at or around the date of administration, the comments made to FRP by the fifth respondent as to the claimant which were untrue, and the failure of the first respondent to contact the claimant at the time of the purchase of the assets and business of Harley. There had been a dismissal on or around 30 May 2019.

63. It was argued that the principal reason for the dismissal was the claimant's pregnancy, and that there had been unlawful discrimination on grounds of her pregnancy. Reference was made to section 18 of the 2010 Act.

64. It was submitted that the dismissal separately was unfair under the 1996 Act. No reason for dismissal had been provided, save that in the FRP letter which was a sham. There was an argument that there should be an award for the failure to provide written reasons for the dismissal. Separately there was an entitlement to an award for the failure to inform and consult in the transfer, which was an award made against the first respondent which was jointly and severally liable with Harley for the failings. The only sum sought under the head of unlawful deduction from earnings was for accrued holidays amounting to 38 hours, in the sum of £589.

65. In respect of discrimination, it was suggested that the award, having regard to the evidence heard, should be £25,000 being at the upper end of the middle band of ***Vento***. It was suggested that an award for losses should include the lost purchase costs, the re-training costs, and loss of salary for 12 months for the period after 2 December 2019, the intended date of return to work after maternity. The sum involved would require to be grossed up for tax.

66. There was further a claim for uplift of 25% for the failure to follow the ACAS Code of Practice in respect that the reason given by FRP was failure to attend for work.

67. So far as the liability of the second to fifth respondents was concerned, the argument was that there should be joint and several responsibility. The second respondent was a shareholder of Harley. The third respondent had been a director of the first respondent. The fourth respondent was a shareholder of Harley and had control of the first respondent, was a director of the respondent, and was the person who was said to have purchased the business and assets of Harley. The fifth respondent had been a manager of Harley, had given false information about the claimant to FRP such that the claimant was not included in the transfer, and had a continuing role with the first respondent. Both the fourth and fifth respondents were said to have aided and abetted the discrimination.

68. The claimant further sought interest on the awards, and latterly made an application for expenses. It was confirmed that the solicitors were acting under a damages based agreement under which the fee was 25% of the award, plus VAT. It was argued that the respondents had conducted the proceedings unreasonably, by failing to engage with the process, by failing to admit liability and resolving the issue of remedy. The claimant had as a result been put to further legal expenses. The claimant sought her own travel costs of £141.96 for her and her husband, and her solicitor's costs similarly of £90.45.

The law

Statute

69. Section 4 of the Equality Act 2010 ("the Act") provides that pregnancy and maternity are protected characteristics. The Act makes provision for direct discrimination in section 13.

70. Section 18 of the Act provides as follows:

"**18 Pregnancy and maternity discrimination: work cases**

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

71. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

…..

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

…….

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

72. Section 111 of the Act provides:

"**111 Instructing, causing or inducing contraventions**

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

73. Section 112 of the Act provides:

"**112 Aiding contraventions**

(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

(2) It is not a contravention of subsection (1) if—

(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and

(b) it is reasonable for A to do so.

(3) B commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (2)(a) which is false or misleading in a material respect.

(4) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this Act to which the basic contravention relates.

(6) The reference in subsection (1) to a basic contravention does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools)."

74. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

75. Section 213 of the Act provides:

"**213 References to maternity leave, etc**

(1) This section applies for the purposes of this Act.

(2) A reference to a woman on maternity leave is a reference to a woman on—

(a) compulsory maternity leave,

(b) ordinary maternity leave, or

(c) additional maternity leave.

(3) A reference to a woman on compulsory maternity leave is a reference to a woman absent from work because she satisfies the conditions prescribed for the purposes of section 72(1) of the Employment Rights Act 1996.

(4) A reference to a woman on ordinary maternity leave is a reference to a woman absent from work because she is exercising the right to ordinary maternity leave.

(5) A reference to the right to ordinary maternity leave is a reference to the right conferred by section 71(1) of the Employment Rights Act 1996.

(6) A reference to a woman on additional maternity leave is a reference to a woman absent from work because she is exercising the right to additional maternity leave.

(7) A reference to the right to additional maternity leave is a reference to the right conferred by section 73(1) of the Employment Rights Act 1996.

(8) 'Additional maternity leave period' has the meaning given in section 73(2) of that Act."

76. The remedy for a breach of the 2010 Act is in section 124, and includes an award of compensation.

77. The relevant provisions in relation to unfair dismissal are in the 1996. There are provisions as to automatic unfairness which include section 99 which provides as follows:

"99 Leave for family reasons

[(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if-

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,……"

78. The nature of the remedy as to basic award and compensatory award is set out in sections 119 and 124 of the Act.

79. The provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 include Regulation 3 as to the definition of a relevant transfer, which provides as follows:

"3 A relevant transfer

(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;…….

(2) In this regulation 'economic entity' means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary……..”

80. Regulation 4 provides as follows:

“**4 Effect of relevant transfer on contracts of employment**

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee…….”

81. Regulation 13 has the following provisions on the duty to inform and consult:

“**13 Duty to inform and consult representatives**

(1) In this regulation and regulations 13A, 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

82. Regulation 14 sets out the requirements on election of employee representatives, and Regulation 15 has the following provision on the remedy in the event of a failure to inform or consult:

"**15 Failure to inform or consult**

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

(c) in the case of failure relating to representatives of a trade union, by the trade union; and

(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances……

……..

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

(a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;

(b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

83. Regulation 16 limits the award of compensation to a maximum of thirteen weeks' pay, having regard to the seriousness of the failure.

84. The relevant provisions for unlawful deduction from wages are in Part II of the Employment Rights Act 1996, with the definition in section 13.

85. The requirement for an employer to provide written reasons for dismissal is found in section 92 of the 1996 Act.

Case law

(i) Discrimination

86. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? The case law applicable to a case of direct discrimination under section 13 of the 2010 Act is I consider also appropriate for a claim under section 18 of that Act. In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh***

Borough Council [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** *th*e act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

87. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

88. In ***Glasgow City Council v Zafar [1998] IRLR 36,*** also a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was, in the present case, her pregnancy and maternity leave.

89. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

(ii) Burden of proof

90. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. The tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council [2006] IRLR 748***, an EAT authority approved by the Court of Appeal in ***Madarassy***.

(iv) Inducing, causing, instructing or aiding discrimination

91. The Equality and Human Rights Commission Code on Employment gives guidance on the issues that arise under sections 111 and 112 of the 2010 Act, in paragraphs 9.18 in which it is stated that inducement may amount to no more than persuasion and 9.27 where it is stated that help will be unlawful even if it is not substantial or productive, so long as it is not negligible.

Joint and several liability

92. The Tribunal has the competence to make an award in respect of discrimination on a joint and several basis, as held in ***Way and another v Crouch [205] ICR 1362.*** Whilst it was also stated in that case that the Tribunal should seek to apportion the award, that approach was doubted in later case law, such as ***Bullimore v Pothecary Witham Weld and another [2011[IRLR 18,*** and ***London Borough of Hackney v Sivanandan [2011[] ICR 1374,*** and when the latter case reached the Court of Appeal, reported at ***[2013] ICR 672,*** the ***Way*** line of argument as to apportionment was overruled. The result is that where it is not possible to identify distinct elements of loss caused by individual respondents, a joint and several award is both competent and appropriate.

(v) Causation

93. Where there is a claim under section 99 of the 1996 Act, the issue of causation is to be construed in the same way as in direct discrimination in, as explained in ***Indigo Design and Build Management Ltd v Martinez UKEAT/0020/14*** and ***Interserve FM Ltd v Tuleikyte [2017] IRLR 615***.

(vi) TUPE

94. A summary of the law in relation to when there is a transfer of undertaking under Regulation 3(1)(a) of the Regulations is in ***Cheesman and Ors v Brewer Contracts Ltd [2001] IRLR 144.*** The first step is to identify the economic entity, and the second to establish whether that transferred.

(vii) Dismissal

95. A dismissal may be held to have occurred from the overall circumstances – ***Kirklees Metropolitan Council v Radecki [2009] ICR 1244.*** Where a letter is received that is construed in light of the facts known to the employee at that point ***Chapman v Letherby and Christoper Ltd [1981]***

IRLR 440. Those cases are in the context of the law of unfair dismissal but the principles apply equally to discriminatory dismissals.

(viii) Written reasons

96. Section 92 of the 1996 Act requires the employer to give any employee dismissed after two years of employment a written statement of the reasons for dismissal, but only provided there has been a specific request, see ***Catherine Haigh Harlequin Hair Design v Seed [1990] IRLR 175***

Observations on the evidence

97. The claimant gave her evidence in a very measured and professional way. She did not exaggerate matters, in fact she tended to do the reverse. She was scrupulous in seeking to be honest and accurate. When speaking of the effect of the termination of employment on her she became upset, but fought to control her emotions. The manner in which she gave her evidence does her much credit.

98. It became rather more clear what the effect of what had occurred had been on the claimant when her husband gave evidence. He did so briefly, but entirely convincingly. He spoke in a very straightforward manner about the substantial level of upset demonstrated by his wife both at the time of the termination, and up to the present time.

99. I had no hesitation in accepting the evidence given by the claimant and her husband.

100. As noted above, none of the respondents had entered any appearance in the case, nor did any seek to participate in the Hearing. In light of the terms of the Claim Form, I consider that that is surprising. Nevertheless, that is the position.

101. I have drawn inferences from both the evidence I did hear, and the absence of any contradiction, as I set out below.

Discussion

(i) Transfer

102. The first issue is whether or not there was a relevant transfer under Regulation 3 of the Regulations. I have no difficulty in finding that there was, under Regulation 3(1)(a). The circumstances set out above do I consider clearly meet the statutory test. There was an economic entity which conducted the business of Harley at its one set of premises, and did so with an organised grouping of employees. That entity transferred, and retained its identity following transfer. It used the same items of equipment and furniture, trading from the same premises without interruption. It serviced the same clients. It retained the same trading name and insignia. It included six of the employees of Harley.

103. The claimant was clearly a person assigned to that which transferred, under Regulation 4. She worked only in the organised grouping of employees which had operated the business of Harley.

104. These conclusions are fortified, if that were needed, by the documentation from the administration which made clear that the administrators of Harley regarded the circumstances as amounting to a relevant transfer, and their actions included corresponding with those employees they arranged to transfer to the first respondent.

105. I consider that the claimant's employment transferred to the first respondent on 20 May 2019 under the terms of the Regulations accordingly, by operation of law. All rights and liabilities of Harley transferred to her on that date under Regulation 4 of the Regulations.

(ii) Dismissal

106. The second issue is whether there was a dismissal, and if so when. That is not straightforward, as the administrators had not contacted the claimant

at the point of administration, rather they did so nine days later in circumstances where there had been a relevant transfer affecting six other staff They then purported to dismiss her, on either of two bases each of which was I consider inept, and then to do so with retrospective effect which I also consider to be inept. I was however concerned by the fact that the letter came from the administrators in those circumstances, and that there was no contact from, or to, the first respondent. I was also concerned that the administrators would, if reasonable enquiry had been made of the records of Harley, or those employees who did transfer, have been able to discover that the claimant was on maternity leave. I was further concerned that the administrators themselves acknowledged the possibility of a relevant transfer having taken place under the Regulations.

107. I consider that given all the circumstances, there was a dismissal of the claimant by the first respondent by the combination of what she had been told by the fourth and fifth respondent on 21 and 20 May 2019 respectively, the letter from FRP which she received on 30 May 2019, the comments made by Mr Wilson to her on that date, together with inaction by the first respondent which made no contact with her at all. Whilst FRP in the letter did not state that they were directly acting for the first respondent, and wrote after transfer, I consider that the first respondent was aware of what that letter contained, as were the fourth and fifth respondents themselves. That is because the fourth respondent stated in an email to the claimant that the administrators were dealing with matters, after he had been asked about the purchase of the business. I refer to that issue further below. It was I consider the combination of those circumstances that led to there being a dismissal by the first respondent, which had become the employer by virtue of the transfer on 20 May 2019, and the claimant having been assigned to that which transferred.

108. I consider that that dismissal was on 30 May 2019. It cannot have been earlier than that date, as until then the claimant was not aware of what was said to be her employment status (the need for the claimant to be aware of the contents of such a letter which informs someone of a dismissal, or at least have a reasonable opportunity to be so aware, was

set out by the Supreme Court in ***Gisda Cyf v Barratt [2010] IRLR 1073***, in the context of the identification of the effective date of termination for purposes of unfair dismissal, but I consider that the same principles apply to determine the date of a dismissal for other purposes, including for this case). The FRP letter that purported to intimate a termination earlier than that was I consider inept. It had as its basis either an alleged cessation of attending work, which had not occurred as I discuss in more detail below, or a dismissal on the date of the administration which had not been intimated to her at that time, was contradicted by the emails sent to her on or around that date, and was in any event superseded in law by the transfer itself, of an economic entity to which she had been assigned, which had occurred on 20 May 2019. It is for these reasons that I consider the letter from FRP to have been inept. They are not a party to the present proceedings, and in light of that I make no comment on how competent or otherwise were their actions.

109. The fourth and fifth respondents in effect either lied to her, or remained silent on matters of which they were aware, in messages sent on or the day after the administration of Harley. They did not suggest that the claimant had not been transferred, on the contrary the fifth respondent suggested that it was “good news”. He can only have known that given his passing to FRP of the name of the claimant as having, he claimed, ceased to attend for work it was not good news for her. That perhaps explains why he did not state to her that there was a transfer of employment under the Regulations.

110. It was on her receipt of the letter of 29 May 2019 and call to Mr Wlison that she was informed of what was said to have been the termination of her employment, and whilst that was from the administrators of Harley rather than the first respondent itself, the first respondent being by then her employer and not Harley, given the circumstances overall the letter was in effect intimating a decision made by the first respondent.

111. I therefore find that there was a dismissal by the first respondent which took place on 30 May 2019. Had it been necessary to do so I would have found that the claimant was entitled to regard the circumstances as

repudiatory and amount to a dismissal under section 39(7)(b) of the 2010 Act. That is also a dismissal.

(iii) Reason

112. The third issue is the reason for the dismissal. I consider that the only viable reason from the evidence was that the claimant was on maternity leave. That was why she did not actually attend work from 1 March 2019, the first day of her maternity leave. She did however have an agreement to return to work, and that was her intention. Her maternity leave fell within the definition in section 213 of the 2010 Act.

113. The circumstances also include firstly that the fifth respondent entirely wrongly informed FRP that the claimant had ceased to attend for work prior to the administration. He knew that she was on maternity leave. He was in contact with her even on 20 May 2019 itself. He had acted in an inappropriate manner towards the claimant earlier during her pregnancy, for example in criticising her about the issue over X-rays. Her concern was perfectly understandable for someone who was pregnant with her first child. The reaction to it was not appropriate. She had also commented on a last minute change of shift, and he had reprimanded her about that, stating that had she not been pregnant she would have been dismissed. That was again not an appropriate remark to have made.

114. There had not been a “cessation” of attending work on the part of the claimant. That word is indicative of a permanent ending of attendance at work. For the claimant, that was not what had happened. She was on maternity leave, and the prospective date for her return to work had been agreed as 2 December 2019. She had no more ceased to attend work than if she had been on annual leave. She was intending to return to work and had statutory rights in that regard, as well as agreement with Harley reached prior to administration.

115. The sole reason for the dismissal of the claimant was her maternity leave. In light of ***Shamoon*** I make that finding from the evidence I heard. In the event that a comparator was needed, however, Kristina was an employee who transferred employment to the first respondent, and who was not pregnant or on maternity leave. A hypothetical comparator, in the same circumstances as the claimant but who was not by then on maternity leave, would I consider also have been included in those who transferred by the first respondent, fourth respondent and fifth respondent.

116. I have made those findings from the evidence I heard, drawing inferences where I considered that appropriate. Had I not done so, I would have applied the burden of proof provisions, and concluded that the claimant had established a strong prima facie case sufficient to shift the burden to the first respondent. In the absence of evidence from the first respondent, that burden cannot be discharged, and the finding of the reason made accordingly.

117. Section 18 of the 2010 Act provides that a person discriminates against a woman if that person treats her unfavourably because she is exercising or seeking to exercise the right to ordinary or additional maternity leave. The claimant was, at the date of dismissal, in her period of ordinary maternity leave and was seeking to exercise her right to additional maternity leave in the emails with Harley about a return to work on 2 December 2019. Her dismissal was unfavourable treatment in breach of that provision.

118. I have therefore concluded that the claimant's dismissal was unlawful discrimination under section 18 of the 2010 Act.

(iv) Individual liability

119. The inferences I draw from the evidence I have heard are that the view of the fifth respondent was that he did not wish the claimant to remain an employee in light of her then current maternity leave. I infer that the fifth respondent sought to use the administration and sale to the first respondent to achieve that by securing her omission from those employees who transferred to the first respondent, placing her entirely

wrongly on a list of those who he alleged to have ceased to attend work. In that regard I take into account that he had represented in an email that he had owned at least a part of Harley and that shares had been held by someone sharing his surname. He had been engaged to a material extent in the management of Harley. He continued to work within the first respondent, as he acknowledged in an email to the claimant and as Kristina confirmed separately to the claimant. His email to the claimant on the date of administration was entirely inconsistent with his having passed to the administrators a list of employees who, it was claimed, had ceased to attend work. He can only have been aware that the claimant had not cased to attend work, but was on maternity leave.

120. I infer from that that he had made the arrangements to secure the claimant's omission from what ought to have been a transfer of her employment to the first respondent under the Regulations. His actions in so doing were either instructing the dismissal, or inducing it, within section 111 of the 2010 Act. Separately his actions were aiding the dismissal under section 112 of that Act, in my opinion.

121. The position of the fourth respondent is different. He had been a shareholder to a small extent of Harley, he was a dentist at the Harley premises, working there on about two days per week, and it was said in the emails sent at or around the time of the administration that he had purchased the business of Harley, albeit done through the vehicle of the first respondent which he had significant control of. He said in his email to the claimant that matters were in the hands of the administrators, or words to that effect. From that I infer that he was involved in the decisions made about the claimant not being included in those to transfer under the Regulations, including the list prepared by the fifth respondent of those who had allegedly ceased to attend work and was aware of the terms of the letter sent to the claimant on 29 May 2019 by FRP. He did nothing to contact the claimant about her transferring either personally, or by the first respondent itself. His email message to her on 21 May 2019 conspicuously failed to refer to the transfer, that some staff were to

transfer, and made no mention of her own position in relation to that transfer.

122. He was, I infer, complicit in the attempt by the fifth respondent by the list he prepared and sent to the administrators to ensure that the claimant did not transfer. The reason he wished that to occur was because she was on maternity leave. He was I infer the person who ultimately made decisions as to the management of the first respondent. I infer from the evidence that the fourth and fifth respondent effectively acted together in securing the outcome that the claimant was not included on the list of those who were to transfer to the first respondent's employment. Section 111(4) provides that inducement may be direct or indirect.

123. I consider that the fourth respondent acted so as to induce the unlawful dismissal by the first respondent, under section 111, of the 2010 Act, and separately to aid the contravention of section 18 under section 112.

124. In light of the findings I have made, and having regard to the case law on joint and several liability set out above, I consider that each of the first respondent, fourth respondent and fifth respondent is jointly and severally liable to the claimant for the unlawful discrimination that arose at her dismissal.

125. I have reached the decisions above in respect of the fourth and fifth respondents on the basis of the evidence before me, and the inferences I was able to draw. Had it been necessary to do so I would also have considered the burden of proof provisions, and found that the claimant had raised a strong prima facie case in each respect, and that the burden had shifted to each of those respondents, who had not sought to discharge the burden in each case. The same outcome would therefore have been reached from the application of the burden of proof provisions.

126. In so far as the second respondent and third respondent are concerned, I do not consider that sections 111 and 112 can be said to apply. There was no evidence of either of them having involved in decision making on or after the date of the administration. That was also consistent with the

evidence of resignation as a director or ceasing to be a shareholder of Harley on which I have made the findings above. On the date of administration the second respondent emailed the claimant but did not either induce, or aid, what occurred as set out above in the terms of those provisions. He in effect referred her to the fourth respondent as being the person in control of the first respondent which had purchased the business of Harley in a pre-pack administration. I do not consider that that can be said to have been a breach of the terms of either section 111 or 112 of the Act. There was almost no evidence of any involvement by the third respondent at any stage.

127. In light of that, I do not consider that there is any basis on which to hold that either of the second respondent or the third respondent is liable to the claimant and the Claim so far as pursued against them must therefore be dismissed.

(v) Fairness

128. I consider that the dismissal by the first respondent was separately automatically unfair under section 99 of the 1996 Act. The reason as to her maternity leave set out above applies under that provision in addition.

129. I do not require to address other arguments put forward by the claimant under the 2010 Act or the 1996 Act in light of those findings.

(vi) Other claims

130. I consider that there had been an unlawful deduction from wages of the claimant, which I refer to further under remedy below. She was not paid her accrued holiday pay. No payment of the same was made to her by any party.

131. There was a claim for the failure of the first respondent to provide written reasons for dismissal. It was also said that the FRP letter did not do so. I do not consider however that that letter by itself constituted the dismissal.

There had, by operation of law, been a transfer of the claimant's employment to the first respondent on 20 May 2019. Her employer from that date onwards was the first respondent. The letter sent to her, which the first respondent was, I infer, aware of and complicit in, together with the acts and omissions of the first respondent in relation to that, constituted the dismissal on 30 May 2019. No reasons for that dismissal have been proffered at any stage directly by the first respondent. No request for such reasons was however made of the first respondent, as no contact with that party was made. I do not consider that an award for the failure to provide written reasons is competent in light of the authority referred to above.

Jurisdiction

132. For the avoidance of doubt I did separately consider the issue of jurisdiction. The premises where the claimant worked were in London. The first respondent is a company incorporated in Scotland with its registered office situated in Scotland. A company was held to 'reside' in England by virtue of having its registered office in London even though it had its operational base in Aberdeen (***Odeco (UK) Inc v Peacham [1979] ICR 823***. Rule 8(3) in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that there is jurisdiction over respondents if one of them resides in Scotland, and having regard to the position of the first respondent I consider that the Tribunal does have jurisdiction over the respondents accordingly.

Remedy

(i) Discrimination

133. Compensation is considered under section 124, which refers in turn to section 119, of the 2010 Act. The first issue is injury to feelings. I was satisfied that this was a case within the middle band of ***Vento v Chief***

Constable of West Yorkshire Police (No 2) [2003] IRLR 102 in which the Court of Appeal gave guidance on the level of award that may be made. Three bands were referred to in that authority being lower, middle and upper.

134. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award needed to be increased to reflect inflation. The lower band would go up to £6,000; the middle to £18,000; and the upper band to £30,000.

135. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2019, the Vento bands include a middle band of £8,800 to £26,300.

136. Whilst there was no GP report there were entries from the GP records produced, together with the evidence of the claimant and her husband it was clear to me that the claimant had suffered greatly by what occurred. The dismissal took place less than three months after the birth of her baby. It was known by the first, fourth and fifth respondent that the claimant and her husband were on the point of purchasing their first home, for which a mortgage was required. It was obvious that to terminate employment in such circumstances would exacerbate the injury that was caused.

137. The claimant also spoke of the hurt she felt at the lack of contact with her, in the context of her having remained working in the weeks up to the birth at the specific request of the fifth respondent and without her taking the holidays she had requested and been told would be addressed. Her husband gave further details of the extent of injury, and spoke eloquently of the effect that the dismissal had had on the claimant.

138. I decided that the appropriate award for injury to feelings was above the mid-point in the middle band of ***Vento***, as subsequently varied, but not at the level suggested in submission. The effect on the claimant was material, both in respect of her mental health, on which she consulted her GP several times, but also for the practicality of her house purchase not being able to proceed. That all took place fairly shortly after the birth of her first child. She was at that stage in a vulnerable emotional state, which continues to the day of the hearing, and is likely to last for a further year. I consider that it is appropriately quantified in the sum of £20,000. Interest is due on that at one half of the judicial rate, thus 4% per annum from 30 May 2019 to the date of this decision, which I calculate to be £533.33.

139. In so far as financial losses are concerned, I accepted the evidence that the dismissal had meant the loss of sums paid for towards the prospective purchase of property in Bournemouth, and that included legal costs of £240, travel expenses of £535.15, and a valuation fee of £200. That is a total of £975.15.

140. The claimant had intended to remain on maternity leave until 2 December 2019, which had been agreed with Harley. That agreement ought to have transferred to the first respondent under the Regulations. The claimant has received, from HMRC, the statutory maternity pay she would have received in the period up to that date. Thereafter, there had been agreement with the fifth respondent that the claimant may undertake additional duties, but the detail of them, and the pay increase being discussed, was not formalised. I am not able to conclude what any increase is likely to have been, and assess loss on the basis of the net income prior to the maternity leave commencing.

141. I accepted the evidence that the claimant had mitigated her loss. She undertook training in a new discipline for her, which she will more easily be able to undertake at home whilst caring for her child, but lead to a salary level likely to be no less than and probably higher than that which she would have earned from the first respondent. I consider that a period of 14

months loss of earnings from 2 December 2019 is reasonable. The net pay she would have received from the first respondent would have been no less than £2,254.90 per month. I calculate the sum for loss of earnings to be 4 months at £2,254.90 per month, a total of £31,568.60.

142. I also accepted the evidence as to the cost incurred for that training, in the sum of £99 for preparation, and three fees for exams at each of three stages, at £185 each, a total of £654.

143. The total amount for financial losses is the sum of £33,197.75, and the total sum awarded in respect of discrimination is, with the injury to feelings award and interest, £53,731.08. That then requires to be grossed up for tax, as referred to below.

Unfair dismissal

144. Whilst there was a claim for a basic award, I do not consider that I can award that in circumstances where the claimant did receive her statutory redundancy payment, albeit from the Redundancy Payments Service.

145. The losses that otherwise I would have awarded as a compensatory award have been addressed in the award above, and are not therefore awarded again, with the exception of a sum for loss of statutory rights. The sum claimed in that regard was £500. That is, I consider, a reasonable sum to award.

Failure to inform and consult over transfer

146. There was a complete failure to inform and consult with the employees, or representatives, under the Regulations. It was clear that arrangements for a transfer were discussed prior to the transfer itself. This was a “pre-pack”, with the administration taking not straightforward. There was a price paid

of £200,000. There were items of stock, equipment, furniture and similar. About six employees did transfer. Arrangements were made with the landlord to allow the first respondent to occupy the same premises with a view to concluding a more long-term arrangement. I infer that arrangements must also have been made with suppliers, and some of the patients who were in the middle of treatment. The complete failure to inform and consult, particularly in circumstances where not all employees were told that they would transfer, has not been explained in any way. I consider accordingly that the maximum award is appropriate – see ***GMB v Susie Radin Ltd [2004] IRLR 400.*** It is a sanction for breach not compensation for loss, and is dependent primarily on the seriousness of the breach, although all circumstances are considered.

147. There was a total breach of the provisions in respect of the claimant, and no reason for that has been put forward by the first respondent. I consider that the appropriate amount is the statutory maximum of thirteen weeks' pay. The first respondent as transferee has joint and several responsibility for the default. Harley as transferor is not a party to these proceedings.

148. The award is on the basis of gross pay. The figure for gross pay is calculated on the basis of sections 221 – 224 of the 1996 Act, which was the basis used by HMRC when calculating statutory maternity pay. The figure they assessed from the evidence before me, which I consider to be accurate, is £616.46. Applied over 13 weeks that sum produces an award of £8,013.98.

Uplift

149. The claimant sought an award for the failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures under section 207A and Schedule A2 to the Trade Union and Labour Relations (Consolidation) Act 1992. I do not however consider that such an uplift is

appropriate. The claimant was not dismissed for misconduct, but for reasons related to maternity. If it is suggested that the reason was in relation not an alleged cessation to attend for work, that implies that the claimant had by her actions resigned from employment, rather than that she had been dismissed for a reason related to conduct. No uplift is therefore made in accordance with that provision. In any event, in light of the award made for discrimination and the limit on the compensatory award, it is not apparent that such an award would have been appropriate, as it would have led to double-counting for the same loss.

Unlawful deduction from wages

150. The claimant had 38 hours of holidays accrued at time of dismissal, for which liability passes to the first respondent under the Regulations. The failure to pay it is an unlawful deduction from wages. The sum in that regard is £589.

Total and grossing up

151. The total of all these sums is £62,834.06. That exceeds the amount which is payable without the incidence of income tax, being £30,000. It is therefore necessary to gross up the award so far as it exceeds that sum in order to take account of incidence of income tax that becomes due on the payment of the award. The calculation of that amount is as follows:

(i) £62,834.06 less the tax free element of £30,000 = £32,834.06

(ii) £32,834.06 less the claimant's personal allowance of £12,500 = £20,334.06

(iii) The marginal rate of tax on £20,334.06 is 20% for the claimant.

(iv) Grossing up £20,334.06 is by that sum divided by (100 -20) = 80 multiplied by 100 = £25,417.57, which equates to tax in the amount of £5,083.51.

(v) The total sum accordingly is £62,834.06 added to which is the tax due of £5,083.51, a total of £67,917.57.

Award against first respondent

152. The total award I make against the first respondent is therefore in the sum of £67,917.57. In respect of the unlawful discrimination it is made jointly with the fourth and fifth respondent.

Second respondent

153. For the reasons set out above I have dismissed the claim as laid against the second respondent.

Third respondent

154. For the reasons set out above I have dismissed the claim as laid against the third respondent.

Fourth respondent

155. I have made a finding against the fourth respondent in respect of the claim of discrimination only. I hold that the fourth respondent has liability for the discriminatory dismissal jointly and severally with both the first respondent and fifth respondent. The sums I have awarded for discrimination are set out above, and total £53,731.08. They require to be separately grossed up so far as this aspect of the award is made as against the fourth respondent, as follows:

(i) £53,731.08 less £30,000 being the tax free element - £23,731.08

(ii) Deduction of the personal allowance of £12,500 leaves £11,231.08

(iii) Tax is due at a marginal rate of 20%, which is £11,231.08 divided by 80 x 100 = £14,038.85, with the amount of tax being £2,807.77.

(iv) The tax sum of £2,807.77 is added to the award of £53,731.08, producing a total of £56,538.85.

156. The award against the fourth respondent is therefore in the sum of £56,538.85.

157. It is made on a joint and several basis with the first respondent and the fifth respondent.

158. For the avoidance of doubt, therefore, the award against the fourth respondent is not cumulative with that against the first and fifth respondents. If the sum awarded against the first respondent is paid in full, that extinguishes the sum payable by the fourth respondent. Similarly, if the sum awarded against the fourth respondent is paid in full by the fifth respondent, that extinguishes the sum payable by the fourth respondent. If the award is paid by either the fourth or fifth respondent, that part of the award due by the first respondent becomes extinguished.

Fifth respondent

159. I have made a finding against the fifth respondent in respect of the claim of discrimination only. I hold that the fifth respondent has liability for the discriminatory dismissal jointly and severally with both the first respondent and fourth respondent. The sums I have awarded for discrimination are set out above, and total £53,731.08. They require to be separately grossed up so far as this aspect of the award is made as against the fourth respondent, as follows:

(i) £53,731.08 less £30,000 being the tax free element - £23,731.08

(ii) Deduction of the personal allowance of £12,500 leaves £11,231.08

(iii) Tax is due at a marginal rate of 20%, which is £11,231.08 divided by 80 x 100 = £14,038.85, with the amount of tax being £2,807.77.

(iv) The tax sum of £2,807.77 is added to the award of £53,731.08, producing a total of £56,538.85.

160. The award against the fifth respondent is therefore in the sum of £56,538.85. The calculation of the sum awarded, and the context in which that is done, is the same as that which is set out above for the fourth respondent. If the sums awarded above are paid in full by either the first respondent or the fourth respondent that extinguishes the sum payable by the fifth respondent.

Expenses

161. The claimant also sought an award of expenses. It was contended that that was as the respondents had not acted reasonably in these proceedings, had not entered appearance in them, had not accepted liability as they ought to have done, and had not engaged with the assessment of remedy. Whilst there is some force in that submission, the difficulty that then arose was that the claimant had engaged solicitors on a damages based agreement, by which they are paid 25% of the sum agreed or awarded, together with VAT, and a further sum of £500 plus VAT for the Final Hearing, and any outlays or disbursements. That form of agreement is not one that applies under the law of Scotland. In any event, it means that the same fee is payable whether there is an agreed settlement with a party which acts reasonably and responsibly, or one made after a Final Hearing whether or not the proceedings are defended.

162. Against that background I did not consider that it was appropriate to award all the expenses that the claimant will incur to her solicitors, having regard to the terms of Rule 76, but I did consider that it was appropriate to do so in respect firstly of the additional fee for the Final Hearing of £500 plus VAT and for the costs involved in attendance at that hearing by the solicitors of £90.45 and two witnesses of £141.96. The failure by any respondent to engage with the proceedings despite the terms of the Claim Form required the claimant to attend for the hearing and give evidence, as there was no resolution of the claims made, nor any attempt to do so.. I consider that that does amount to acting unreasonably in the conduct of the proceedings under that Rule, having regard to the findings that I have made. The total expenses I award is £832.41, against the first, fourth and fifth respondents.

Penalty

163. Employment Tribunals have a discretionary power in certain circumstances to order employers who lose a claim to pay a financial

penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A, which was inserted by section 16 of the Enterprise and Regulatory Reform Act 2013. It has subsequently been amended.

164. The provision states as follows:

““**12A Financial penalties**

(1) Where an employment tribunal determining a claim involving an employer and a worker—

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

(2) The tribunal shall have regard to an employer's ability to pay

(a) in deciding whether to order the employer to pay a penalty under this section;

(b) (subject to subsections (3) to (7)) in deciding the amount of a penalty.

(3) The amount of a penalty under this section shall be—

(a) at least £100;

(b) no more than £20,000.

This subsection does not apply where subsection (5) or (7) applies.

(4) Subsection (5) applies where an employment tribunal—

(a) makes a financial award against an employer on a claim, and

(b) also orders the employer to pay a penalty under this section in respect of the claim.

(5) In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—

(a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;

(b) if the amount of the financial award is more than £40,000, the amount of the penalty shall be £20,000.

(6) Subsection (7) applies, instead of subsection (5), where an employment tribunal—

(a) considers together two or more claims involving different workers but the same employer, and

(b) orders the employer to pay a penalty under this section in respect of any of those claims.

(7) In such a case—

(a) the amount of the penalties in total shall be at least £100;

(b) the amount of a penalty in respect of a particular claim shall be—

(i) no more than £20,000, and

(ii) where the tribunal makes a financial award against the employer on the claim, no more than 50% of the amount of the award.

But where the tribunal makes a financial award on any of the claims and the amount awarded is less than £200 in total, the amount of the penalties in total shall be £100 (and paragraphs (a) and (b) shall not apply).

(8) Two or more claims in respect of the same act and the same worker shall be treated as a single claim for the purposes of this section

(9) Subsection (5) or (7) does not require or permit an order under subsection (1) (or a failure to make such an order) to be reviewed where the tribunal subsequently awards compensation under—

(a) section 140(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with tribunal's recommendation),

(b) section 117 of the Employment Rights Act 1996 (failure to reinstate etc),

(c) section 124(7) of the Equality Act 2010 (failure to comply with tribunal's recommendation), or

(d) any other provision empowering the tribunal to award compensation, or further compensation, for a failure to comply (or to comply fully) with an order or recommendation of the tribunal.

(10) An employer's liability to pay a penalty under this section is discharged if 50% of the amount of the penalty is paid no later than 21

days after the day on which notice of the decision to impose the penalty is sent to the employer.

(11) In this section—

"claim"—

(a) means anything that is referred to in the relevant legislation as a claim, a complaint or a reference, other than a reference made by virtue of section 122(2) or 128(2) of the Equality Act 2010 (reference by court of question about a non-discrimination or equality rule etc), and

(b) also includes an application, under regulations made under section 45 of the Employment Act 2002, for a declaration that a person is a permanent employee;

"employer" has the same meaning as in Part 4A of the Employment Rights Act 1996, ……

"financial award" means an award of a sum of money, but does not including anything payable by virtue of section 13

"worker" has the same meaning as in Part 4A of the Employment Rights Act 1996, …….".

165. This power was granted to tribunals, according to the Explanatory Notes to the 2013 Act by which that amendment was introduced:

> 'to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law'. I

166. I consider that that provision may be engaged by the circumstances of the present case. There was a breach of the claimant's rights which might be regarded as serious, and there may be said to be aggravating features by

the deliberate exclusion of the claimant from those who it was accepted by the first respondent would transfer to it, in a pre-pack administration where the fourth and fifth respondents were involved to the extent set out above, solely because of her pregnancy and subsequent maternity leave. The aggravating features may be said to include the information provided to the administrators that the claimant had ceased to attend for work, which was not accurate for the reasons set out above, and the emails sent on 20 and 21 May 2019 that were not accurate, and may be said to have been intended to be deliberately misleading.

167. Any liability is that of the first respondent. In assessing the matter I am however required by the statute to take account of the employer's ability to pay. I have not been provided with any information as to that issue. I am also of the opinion that the first respondent ought to have an opportunity to comment on the potential for a penalty, as it may not have been aware of that from the terms of the Claim Form. The penalty is not payable to the claimant, and not therefore a matter that is addressed directly in the Claim Form.

168. I have therefore directed that the first respondent shall provide a written response on the potential for penalty, and on its ability to pay any penalty that may be imposed, after which that issue shall be separately considered further.

169. In the event that no reply is received within that period, I shall consider the matter from the information available to me.

Conclusion

170. I make the findings and awards as set out in the Judgment above as against the first, fourth and fifth respondent.

171. I dismiss the Claim against the second and third respondent.

172. The issue of any penalty shall be addressed after the first respondent has had an opportunity to respond.

Employment Judge : A Kemp
Date of Judgment : 24 January 2020
Date sent to parties : 28 January 2020